STATE OF MICHIGAN

COURT OF APPEALS

JERRY L. RENOUF and MARJORIE R. RENOUF, Plaintiffs-Appellees, v GORDON N. HELLER and LURA L. HELLER, Defendants-Appellants.	UNPUBLISHED July 14, 2005 No. 255033 Muskegon Circuit Court LC No. 01-040723-CK

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendants appeal as of right from a bench trial verdict of liability for breach of contract based on a purchase agreement for the sale of land. We affirm.

Defendants' first issue on appeal is that certain essential terms of the contract were absent precluding a "meeting of the minds" such that the real estate purchase agreement was unenforceable. In the boiler-plate purchase agreement signed by the parties, the blanks providing for the specific mortgage terms to be obtained by defendant buyers were filled in as "TBD." Defendants contend these terms are essential terms of the contract and cite *Tucson v Farrington*, 396 Mich 169; 240 NW2d 464 (1976), as support. However, that case concerned a land contract and not a contract for the sale of land and is therefore inapplicable in this case. See *Zurcher v Herveat*, 238 Mich App 267, 290-291; 605 NW2d 329 (1999). The essential terms of a contract are the identity of the property, the parties, and the consideration. *Giannetti v Cornillie*, 204 Mich App 234, 239-240; 514 NW2d 221 (1994) (Taylor, P.J., dissenting) (opinion adopted by Supreme Court in *Giannetti v Cornillie*, 447 Mich 998; 525 NW2d 459 [1994]). Here, all the essential elements were present and the contract is enforceable.

Defendants also contend that the use of "TBD" made the terms indefinite such that the contract is unenforceable. Defendants cite supporting language from *Zurcher, supra* that discusses the general requirements of certainty as to price. *Id*. at 282, which cited with approval 77 Am Jur 2d, Vendor and Purchaser, § 8, p 124). However, the same original source also provides that indefiniteness in terms can be made sufficiently definite and certain by reference to "evidence of established customs." 77 Am Jur 2d, Vendor and Purchaser, § 7, p 123. In addition, when the intention of the parties can be determined, a contract with indefinite or ambiguous terms is enforceable. *Id.* Here, two witnesses testified that in Muskegon County, the common usage of "TBD" meant that buyers would work out the details of a mortgage with a

lender. Further, the evidence showed the intention of the parties was that the buyers would obtain a mortgage, but work out the details with a lender later. Therefore, even if "TBD" is an indefinite term, it is capable of being made definite such that the contract is enforceable.

Defendants' next argument is that the two parties have irreconcilable views as to the credit terms at issue because buyers and sellers want different terms for credit, based on their differing needs. We disagree. Generally, the only parties concerned with the buyer's credit terms are the buyer and their lender. Sellers have little interest in what terms a buyer gets, as long as they get enough credit to fulfill their obligation.

Next, defendants argue that the various outcomes possible, if defendants had been ordered to perform on the contract, demonstrate that the credit terms are material. Again, defendants' argument is without merit. Their argument here merely demonstrates why specific performance is not appropriate in this case and why defendants should have filled in specific terms at the time the agreement was made in order to protect themselves from unforeseen onerous financing terms.

Defendants also argue that their position is supported by *Claerhout v Tromley*, 282 Mich 649; 276 NW 711 (1937). We disagree. That case concerns the requirements of the statute of frauds and whether the defendant's parol evidence of an oral modification to a lease agreement was enforceable. Additionally, the term of the lease that was to be modified was the price, an essential term. Since that case is not factually analogous, it does not support defendants' contention. In sum, nothing in defendants' arguments supports their contention that credit terms are essential terms of a contract for the sale of land.

Defendants' second issue on appeal is whether the trial court erred in determining that they were not vested with discretion under the plain and unambiguous language of the agreement to determine whether they were satisfied with the financing contingency. First defendants contend that *Allstate Ins Co v Goldwater*, 163 Mich App 646; 415 NW2d 2 (1987), supports their contention that the language of the agreement is plain and unambiguous. That case holds that even when a contract is inartfully worded or clumsily arranged, if it has only one interpretation, the unambiguous and plain meaning should be given. Here, however, while the meaning of the term "TBD" is clear ("to be determined"), what is meant by the *use* of that term is unclear. Specifically, it is not clear whether the use of "TBD" created a promise by defendants that they would get a mortgage and later work out terms with a lender, or whether defendants' obligation was conditioned upon their ability to obtain a mortgage on credit terms of which they had sole discretion to determine if they were acceptable. Therefore, the use of "TBD" in this case is not plain and unambiguous such that defendants' interpretation of its meaning is the only one.

Next, defendants contend they were vested with discretion under the agreement to determine whether they were satisfied with the credit terms they were offered. However, in order to have that discretion, the meaning of "TBD" must create a condition precedent as opposed to a promise. (See Restatement Contracts, 2d, § 77, comment a, p 195 ("*Illusory promises.* Words of promise which by their terms make performance entirely optional with the "promisor" do not constitute a promise."). Whether the language of a contract creates a condition or a promise is a matter of contract interpretation which is reviewed de novo. *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 253; 661 NW2d 562 (2003). The trial court properly relied on evidence of established customs to determine that a promise was created. 77 Am Jur

2d, Vendor and Purchaser, § 72, p 171. Therefore, defendants were not vested with discretion under the agreement.

Defendants' third issue on appeal is that the trial court's finding that they did not use reasonable efforts to obtain financing was clearly erroneous. We disagree. Defendants contend that the fact that they had one or two conversations with a lender and had an appraisal done constitutes making an application for a mortgage, which fulfilled their obligation under the agreement. However, defendants also refused an offer of a mortgage by their lender, contrary to the clear language of the agreement. Additionally, defendants' efforts were not reasonable because defendants were required to do more than merely make an application. The evidence established that the use of "TBD" meant defendants would work out the terms of a mortgage with their lender. To "work out terms" would require defendants to negotiate, or "communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining." Black's Law Dictionary (7th ed). There was no testimony that defendants discussed interest rates or any terms of financing; rather, they merely had discussions with their lender about the low appraisal and how that affected their down payment. Therefore, defendants did not negotiate for a loan but merely consulted a lender about a loan. Thus, they did not make reasonable efforts to obtain a loan and the trial court's findings are not clearly erroneous.

Defendants' final issue on appeal is that the trial court erroneously admitted and relied upon expert testimony to interpret a contract provision. Defendants did not object to the expert's testimony at trial so the issue is therefore not preserved. However, any error here was harmless because the expert's opinion that the contract was enforceable was consistent with applicable law. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio